No. 3546

In Equity

In the

United States

Circuit Court of Appeals

For the Ninth Circuit

THE WASHINGTON WATER POWER COMPANY
a Corporation Appellant

vs.

KOOTENAI COUNTY, A Municipal Corporation, W. A. THOMAS as Treasurer and Ex-Officio Tax Collector of Kootenai County, Idaho, and C. O. SOWDER, Clerk of the District Court and Ex-Officio Auditor and Recorder of Kootenai County, Idaho, and C. O. SOWDER and W. A. THOMAS, Individuals, Appellees.

Brief of Appellees

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION

BERT A REED,
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STATEMENT

As far as this appeal is concerned there are but five questions to consider:

First: Did the trial court err in finding that the actual value of the plaintiff's taxable property in the State of Idaho subject to assessment by the State Board of Equalization for the year 1918 was $3,620,500?

Second: Did the trial court err in finding that the value of plaintiff's property on December 31st, 1917, as fixed and de-

termined by the Public Utilities Commission of the State of Idaho was $3,587,500?

Third: Did the trial court err in holding that the assessment of the plaintiff's property by the State Board of Equalization was made upon a basis of seventy-five per cent of its actual value?

Fourth: Did the trial court err in holding that the evidence was not sufficient to warrant a finding that the State Board assessed other utilities at fifty per cent of their actual value and in indulging in the presumption that the assessment of the property of such other utilities by the State Board was made upon the same basis as the assessment of plaintiff's property?

Fifth: Did the court err in imposing penalties and interest on that part of the taxes which it found the plaintiff should pay and which were not covered by its tender?

In addition to the matters contained in the statement made by appellant in its brief we desire to direct the attention of the court to the following statutes of the State of Idaho and additional portions of the record which we deem material in considering the questions involved.

It will be enlightening to examine the findings of the trial court and ascertain just what they were and the manner in which they were arrived at.

The finding as to the actual value of the plaintiff's property was based upon a decision of the Public Utilities Commission of the State of Idaho, which was rendered on the 3rd day of June, 1918, and fixed the valuation of said property as of December 31st, 1917.

The decision of the lower court shows that in reaching its decision as to the actual value of plaintiff's property it relied upon the decision of the Public Utilities Commission and held that the plaintiff was bound by that decision in this case.

In this connection the decision reads:

> "The findings of the Public Utilities Commission to which references have already been made are in evidence. By these the defendants are willing to be bound and they insist that under the circumstances these findings are also binding upon the plaintiff. It is pointed out that plaintiff brought the findings to the attention of the Board of Equalization while it had the assessment under consideration, and thus impliedly requested it to accept the conclusions embodied therein. While therefore, we are without direct evidence of the mental operation of the Board we have a case where at the time when it was about to take action, one of the parties represented that it should follow the determination of the Commission and where the other party now insists that such determination is correct and hence impliedly concedes that the Board of Equalization should have accepted and did accept it. In view of these conditions and the further fact that the findings referred to were made by a body invested with the necessary jurisdiction after an extended hearing in a proceeding at which were the State through its Attorney General and the defendant, we may reasonably conclude not only that such findings are correct but that the Board of Equalization which appears to have made no independent investigation accepted them as the basis of the assessment. Accordingly it is held that upon the question of the actual value of plaintiff's property in Idaho, the Board of Equalization adopted the finding of the Commission. (Record pages 77, 78).

Further in determining what the Public Utilities Commission found was the actual value of the plaintiff's property in Idaho, the trial court said:

"On the whole it is thought the decision is so clear that the Board of Equalization must have understood and did understand that the value of that part of the plaintiff's property located in Idaho and hence subject to taxation here was found by the Commission to be $3,587,500. Admittedly the consideration of the Commission did not extend to the St. Maries Lighting system, the value of which the Board may have fairly estimated to be approximately $33,000. Adding this to the $3,587,500 we have a total of $3,620,500 as the actual value of the plaintiff's taxable property in the State. It is thought that the Board of Equalizaion so found the value to be but made an assessment for only $2,750,000. Accordingly it is held that the assessment complained of was and by the State Board of Equalization intended to be on a basis of seventy-five per cent of the actual cash value." (Record pages 80, 81).

With reference to the assessment of the property of other public utilities by the State Board of Equalization the finding of the trial court was:

"The evidence is not sufficient to warrant a finding that the State Board valued any of the utilities at fifty per cent and the presumption will be indulged that its assessments were as to each other upon a basis of equality and, therefore, that it put railroads, telegraph and telephone lines upon the same footing with plaintiff's property" (Record Page 89).

As to the penalties and interest the Court held that the plaintiff had tendered and paid a certain amount and that there was still due the defendant county the sum of $10,049.32 with penalties and interest thereon. (Record page 90). No question was raised before the trial court as to the propriety of imposing penalties and interest on the amount yet unpaid and this question is raised for the first time on this appeal.

STATUTES OF IDAHO.

(References are to Idaho Compiled Statutes of 1919, where the provisions are the same as in 1918).

SEC. 2471—VALUATION.

"The Commission shall have power to ascertain the value of the property of every public utility in this state and every fact which in its judgment may or does have any bearing on such value."

SEC. 2514—HEARINGS TO DETERMINE VALUATION.

"For the purpose of ascertaining the matters and things specified in Section 2471 concerning the value of property of public utilities the Commission may cause a hearing or hearings to be held at such time or times, or place and places as the Commission may designate.******

The Commission shall make and file its findings of fact in writing upon all matters concerning which evidence shall have been introduced before it shall in its judgment have bearing on the value of the property of the public utility affected, such finding shall be subject to review by the courts of this State in the same manner and within the same time as other orders and decisions of the Commission. The finding of the Commission so made and filed when properly certified under the seal of the Commission, shall be admissable in evidence in every action, proceeding or hearing before the Commission or any court in which the Commission, the State or any officer, department or institution thereof, or any city and county, municipality or other body politic and the public utility affected may be interested, whether arising under the provisions of this chapter or otherwise, and such findings when so introduced shall be prima facia evidence of the facts therein stated, as to the date therein stated, under conditions then existing and such facts can only be controverted by showing a subsequent change in conditions bearing upon the facts therein determined."

The Supreme Court of Idaho has construed the sections above quoted and has held that the findings of the Public UtilitiesCommission are admissable in evidence before the State Board of Equalization, and are prima facia evidence of the facts therein contained.

Northwest Light & Water Co. v. Alexander, 29 Ida. 557, 160 Pac. 1106.

FINDINGS OF THE PUBLIC UTILITIES COMMISSION.

As the valuation found by the Public Utilities Commission is the basis for the decision in this case it is advisable to set out the findings of the Commission at some length.

The Commission considered several different elements in arriving at the final valuation, and among other elements considered the cost of reproduction of the plant less depreciation. (Record Exhibits page 253).

In reaching its final conclusion as to the value of the property the Commission expressly said that it did not use any one element as the basis for its ultimate finding, but that it had given consideration to all elements of value.

> "We must, therefore, find the value of all the property of the Washington Water Power Company, used and useful in serving electrical energy to the citizens of the States of Washington and Idaho, and then apportion such valuation between the states upon some rational basis."
>
> "We shall not attempt to fix any separate and distinct value for each of the elements herein discussed, but the same have all been taken into consideration in our final value. Neither has the Commission adopted any one particular theory of value, but has endeavored to give due consideration and weight to all the theories and elements of value.

"The Commission, therefore, finds that the value of all the property of the Washington Water Power Company, both tangible and intangible, used and useful in the business of furnishing electric energy to the citizens of the State of Washington and to the citizens of the State of Idaho, on the 31st day of December, 1917, is the sum of $20,500,000.00

"How shall this be apportioned between the two states? Below in Table VII. will be found apportionments made on different theories, as follows:

First: The total value, to-wit, $20,500,000.00 apportioned in accordance with the value of the physical properties located in each state.

Second: Present value of the property, to-wit, $20,500,000.00 apportioned in accordance with the gross revenue received in each state.

Third: Value of the transmission, transformation and distribution systems in each state, together with an apportionment of the generating system, including tie lines, based on the gross revenue received in each state.

Fourth: Value of transmission, transformation and distribution system in each state, together with an apportionment of the generating system, including the lines, based on the individual maximum demands in each state.

Fifth: Value of transmission, transformation and distributing systems in each state, together with an apportionment of the generating system, including tie lines, based on the indibidual maximum demands in each state.

Sixth: An average of the third and fourth theories.

"Table VII. below will show the amount apportioned to each state on the different theories above outlined.

TABLE VII.

	Washington	Idaho	Total
First	$16,912,500	$3,587,500	$20,500,000
Second	16,236,000	4,264,000	20,500,000
Third	16,719,800	3,780,200	20,500,000
Fourth	16,622,302	3,877,698	20,500,000
Fifth	15,293,000	5,287,000	20,500,000
Sixth	16,671,051	3,828,949	20,500,000

(Ex. R. p. 268, 269, 270)

EVIDENCE BEFORE STATE BOARD OF EQUALIZATION.

In its amended Bill of Complaint the plaintiff alleged that:

"On the fourteenth of August, 1918, and during the annual 1918 meeting of the said State Board of Equalization of the State of Idaho, at the request of this plaintiff, its counsel, John P. Gray, and its Auditor, J. S. Simpson, appeared before the Board of Equalization on behalf of this plaintiff in relation to the assessment of the property of this plaintiff and to the assessment of other property in the State of Idaho; that such hearing, in addition to the facts already presented by this plaintiff, its said counsel presented to and asked the consideration by the State Board of Equalization of the decision and judgment of the Public Utilities Commission of the State of Idaho in the case of Joseph H. Peterson, Attorney General v. The Washington Water Power Company, wherein the said Commission had on the third day of June, 1918, made and entered its judgment and opinion valuing the property of the Washington Water Power Company in the State of Idaho after an investigation by officers and engineers of the said Commission and the taking of testimony and the investigation of the cost of reproduction and facts essential to an understanding of the value of the said property. That said decision not only was presented to but was already in the possession of the said State Board of Equalization and was at the said hearing considered by the said Board. That the valuation of the said property of the Washington Water Power Company by the said Public Utilities Commission of the State of Idaho, was made as of the thirty-first day of December, 1917.

"That the said suit above referred to of Joseph H. Peterson, Attorney General of the State of Idaho, against the Washington Water Power Company was brought for the purpose among other things of having determined and fixed the value of the property of the Washington Water Power Company in the State of Idaho; that the said judgment and decision was rendered only after an ap-

praisement of this plaintiff's property by officers and engineers of the said Public Utilities Commission of the State of Idaho.

"Plaintiff further says that between said thirty-first day of December, 1917, and the second Monday of January, 1918, there was no change in the value of said property." (Record p. 13, 14, 15)

"Plaintiff further alleges that the said State Board of Equalization, in fixing the value of the property of this plaintiff, had no other evidence or facts before it and that the members of the said Board did not hear or receive any other information concerning the value of the said property except that hereinbefore referred to, to-wit, the said reports of this plaintiff and the said judgement and opinion of the said Public Utilities Commission of the State of Idaho except a letter from Fred E. Wonnacott, Assessor of Kootenai County, Idaho, a copy of which is attached hereto as Exhibit 1 and made a part hereof.

"In addition to the foregoing the plaintiff did file one additional statement showing its revenues for the first six months of 1917 and the first six months of 1918 from the Coeur d'Alene Mining District in Idaho and a list of consumers disconnected and new accounts from January 12, 1917, to August 1, 1918, giving the consumer's name, maximum demand and annual revenue therefrom and also showing the percentage of the gross income received by the plaintiff in Idaho and paid as taxes in said state." (Record p. 16)

"Plaintiff further alleges that according to the said judgment and decision of the said Public Utilities Commission of the State of Idaho the value of the operative property of this plaintiff in Idaho on the second Monday in January, 1918, was $2,438,978." (Record p. 16, 17)

Plaintiff's counsel above referred to testified on the trial of the case in part as follows:

"In the year 1918 I appeared before the State Board of Equalization in the matter of the assessment of the property of the Washington Water Power Company, and Mr. Simpson went with me******I did not contend before the

Board that the decision of the Public Utilities Commission on the value of the property of the Washington Water Power Company was binding upon the State Board of Equalization. I cannot remember precisely what I said to the Board but I presented that report to the Board." (Record P. 205)

"I made the statement before the Board of Equalization that the Public Utilities Commission had found the value of the property in Idaho to be $2,400,000 and some dollars and called their attention to the fact that it had so found. I tried to make clear to the Commission that the Public Utilities Commission had found that the apportionment of the total valuation of the property of the Washington Water Power Company of $20,500,000 apportioned in accordance with the value of the physical properties located in each state was $3,587,500 in the State of Idaho, based upon the cost of reproduction new and not upon the value at the date we were discussing. I cannot say that I called the attention of the State Board of Equalization to the fact that the Public Utilities Commission had found that the total value of all the property of the Washington Water Power Company in the State of Idaho and in the State of Washington was $20,500,000." (Record page 209)

"There were six methods proposed for the distribution of this property for rate-making purposes between Washington and Idaho. The tabulation of those various six methods is set down there in Table VII. I can't say that I called attention to that table. I presented them with that report." (Record P. 210)

It is shown at page 17 of the proceedings of the State Board of Equalization by Exhibit 10, the original of which has been forwarded, that the Board heard evidence from Mr. John W. Graham, President of the Public Utilities Commission of Idaho, in connection with the valuation of the plaintiff's property.

"In connection with the discussion on the valuation of

> the Washington Water Power Company of August 17th, evidence was heard from Mr. John W. Graham, President of the Public Utilities Commission of Idaho." (Record p. 17, Original Exhibit No. 10)

The same Exhibit also discloses that the State Board of Equalization made several increases in the assessed valuation of property in Kootenai County, as returned by the Assessor.

Timber lands in Kootenai County were increased fifteen per cent. (Exhibit 10 p. 22).

Standing timber in Kootenai County was increased ten per cent. (Exhibit 10 p. 23)

Lumber in Kootenai County was increaser twenty per cent. (Exhibit 10 p. 24)

The assessor testified that he had assessed the property in Kootenai County at fifty per cent. (Wonnacott, Record p. 171, 177)

Plaintiff and appellant was permitted to offer the testimony of C. E. Arney as to the *unofficial* proceedings of the State Board of Equalization, viz., remarks which he claimed individual members of the Board made during its sessions. (Record P. 137-148).

Defendants objected to this kind of testimony, (Record p. 138) and at the completion of the direct evidence of the witness moved that the whole of his testimony be stricken from the record. (Record p. 144)

The objection and motion were denied and the testimony permitted to stand.

We quote the following remarks of the members of the

Board of Equalization as testified to by Mr. Arney, which are not referred to in appellant's brief:

> "This is a poor time to talk about a reduction in valuation," said Governor Alexander, speaking to Tax Agent Evans, who appeared before the Board. "So far as I am personally concerned it will have no influence. If anything I am for a revision upwards; my eyes are toward heaven rather than earth. I wish to be perfectly frank about the matter. Under the present condition with high rates on everything the State should not be asked to reduce valuation."
>
> And later during Mr. Evans' argument the Governor said:
>
> "My ideas are fixed. I would not discuss the matter of equalizing property to the extent of lowering railroads," and again, "If you talk to me about lowering this year I would not consider it; I think railroad property should be assessed either at present value or higher." (Record P. 138, 139)

Later when talking about the report from a Field Agent the Governor said:

> "I saw that report. I will not pay any attention to that. We did not send him out to decrease values but to increase them." (Record p. 139)
>
> "He (the Governor) made this first statement substantially as I have read it to you, that if he should be a party to making any change in the 1917 assessment of railroads, it would be upward and not downward." (Record p. 147)
>
> "Q. When the Governor made this statement about which you have testified, 'that is what we assess railways fifty per cent,' he contended, did he not, that railways were assessed too low?"
>
> "A. Yes, I think it is susceptible to that inference." (Record p. 148).

ARGUMENT

LAW GOVERNING TAX CASES.

At the very outset we must have in mind the principle of law

governing courts of equity in cases of this character. That principle has been well stated by this honorable court in the following language:

> "The law is thoroughly settled that in such cases the courts have nothing whatever to do with anything less than fraud or a clear adoption of a fundamentally wrong principle in the making of the assessment and levy."

Washington Water Power Co. v. Kootenai County, 210 Fed. Rep. 867.

This rule has been uniformly followed by the Federal Courts.

Railroad Tax cases, 92 U. S. 575, 23 L. ed. 663.

National Bank v. Kimball, 103 U. S. 732, 26 L. ed. 469.

Albuquerque National Bank v. Perea, 147 U. S. 87, 37 L. ed. 91.

Coulter v. Louisville & N. R. Co., 196 U. S. 599, 49 L. ed. 515.

Chicago etc. R. R. Co. v. Babcock, 204 U. S. 585, 51 L. ed. 636.

An unbroken line of authorities by both State and Federal Courts can be cited in support of this principle, but it is so well established and has been so uniformly followed that we assume that this Court will accept it as a fundamental principle of law governing all cases of this kind as did the trial judge when he stated in his opniion:

> "It is well understood, of course, that courts of equity do not interfere with the collection of taxes merely because of an excessive assessment. The over-valuation must be the result of the adoption of a fundamentally erroneous principle, or of a species of fraud practiced by the assess-

> ing officers; or as it is sometimes put, the courts will interfere only in cases where there has been an intentional or systematic discrimination." (Record p. 69)

We do not understand that the decisions of the Supreme Court in the cases of

Green et al v. Louisville & Interurban R. R. Co.

and other tax cases reported in Vol. 244 of the U. S. Reporter, and cited in appellant's brief change the rule in the slightest degree.

As we construe the decisions in these cases they merely hold that an intentional or systematic discrimination on the part of the assesing officers constitutes fraud, actual or constructive, which will entitle the injured taxpayer to equitable relief, and do not add to or detract from the force or effect of the former cases.

ACTUAL VALUE OF APPELLANT'S PROPERTY

It is necessary to an orderly and logical discussion of the questions presented on this appeal that the actual value of the plaintiff's property be first considered, notwithstanding the fact that it is the last question discussed in the appellant's brief.. Throughout the case the question of the actual value has been and it still is the first consideration, as all other questions in the case are necessarily dependent upon it.

In its amended Bill of Complaint the appellant alleged that the actual value of its property was not in excess of $2,470,439. Record p. 17)

The defendants claimed that the actual value of the property was at least the sum of $3,800,000. (Record p. 49)

The court found that its actual value was $3,620,500. (Record p. 80)

The theory on which the plaintiff's suit was brought was that the actual value of its property was the value as found and determined by the Public Utilities Commission of the State of Idaho. In its amended Bill of Complaint it pleaded and relied upon this judgment and decision. (Record p. 16)

It is noteworthy that at no place in the Bill did the plaintiff allege the actual value of the property. It tied its case to the valuation as found by the Public Utilities Commission.

At the meeting of the State Board of Equalization when the assessment in controversy was under consideration by the Board, plaintiff caused its counsel to appear before the Board and present the judgment and decision of the Public Utilities Commission. (Record p. 205).

Its counsel testified on the trial of the case and in addition to the testimony already quoted herein said:

> "I asked the Board of Equalization to reach their full cash value on the decision of the Public Utilities Commission so far as they went into an investigation of the value, cost of reproduction new and depreciation of that property, the depreciated value." (Record p. 210, 211

In its amended Bill of Complaint appellant alleged that the action in which said decision of the Public Utilities Commission was rendered, "was brought for the purpose among other things of having determined and fixed the value of the property of the Washington Water Power Company in the State of Idaho; that the said judgment and decision was rendered only after an appraisement of this plaintiff's property by officers

and engineers of the said Public Utilities Commission of the State of Idaho." (Record p. 15)

It is apparent that the appellant absolutely relied upon the value as found by the Public Utilities Commission, but that it sought to have the Board of Equalization accept *its* construction of the decision instead of exercising an independent judgment. The Board of Equalization was not required to do this. It had the right and it was its duty to consider the findings of the Utilities Commission as set forth in the decision and reach its own conclusions as to the force and effect of such finding.

The report of the proceedings of the Board of Equalization show that it heard evidence from the President of the Public Utilities Commission in connection with the discussion on the valuation of the appellant's property, (Ex. 10 p. 17) and it may fairly be inferred that it received from that source a construction of the findings and decision of the Commission which was entitled to at least as much consideration as that of counsel for the appellant.

Having presented the findings and decision of the Utilities Commission to the assessing board and asked it to be governed thereby, the appellant could not be permitted during the trial of the case, nor can it be permitted now, to attack the action of the Board of Equalization in following the decision, nor will it be permitted to assert in a court of equity that the value of its property as found by the Public Utilities Commission is not the actual value thereof as far as the proceedings before the State Board of Equalization are concerned, or for the purposes of this case.

Appellant having framed its Bill of Complaint, started its suit and proceeded with the trial thereof on the theory that the value found by the Public Utilities Commission was the actual value of its property, it cannot change its theory and reverse its position when it develops that its construction of the decision was erroneous.

Even if it should be held that the technical doctrine of estoppel does not apply, certainly such conduct will not be tolerated in a court of equity.

The statement is made in appellant's brief that, "In Idaho the findings of the Public Utilities Commission with respect to the value of a utility for rate-making purposes is not controlling on the State Board of Equalization."

Appellant took the position that the findings of the Public Utilities Commission as to the value of its property, was controlling before the State Board of Equalization, and in its Bill of Complaint, and is in no position now to assert a contrary doctrine. However, even if not controlling, the findings of the Public Utilities Commission are at least "prima facia, just, reasonable and correct," and may be so regarded by the State Board of Equalization. Such is the express holding in *Northwest Light & Water Co. v. Alexander, Supra,* page 566.

VALUE OF APPELLANT'S PROPERTY AS FOUND BY PUBLIC UTILITIES COMMISSION.

In commenting upon the findings of the Public Utilities Commission as to the value of the appellant's property, the trial judge said in his decision:

"The findings of the Commission are neither equivocal or inconsistent. It is made clear that the ultimate conclusion of present worth it based exclusively upon no one of the several methods more or less commonly employed for reaching the value of such properties, and further that the theory of reproduction cost insofar as it was used was not applied without making allowance for depreciation, but other compensating considerations were recognized.******

"On the whole it is thought the decision is so clear that the Board of Equalization must have understood and did understand that the value of that part of the plaintiff's property located in Idaho, and hence subject to taxation here was found by the Commission to be $3,587,500. Admittedly the consideration of the Commission did not extend to the St. Maries Lighting system, the value of which the Board may have fairly estimated to be approximately $33,000. Adding this to the $3,587,500 we have a total of $3,620,500, as the actual value of the plaintiff's taxable property in the state." (Record p. 80.)

Thus it appears that in the mind of the trial court the finding of the public Utilities Commission as to value was clear and unequivocal, and yet the appellant contends that fraud should be imputed to the State Board of Equalization in adopting the same construction of the findings of the Utilities Commission which the trial judge found was clear and unequivocal.

It requires only a reading of the findings of the Utilities Commission to disclose that the appellant's contention was without merit.

The Utilities Commission made a finding as to the cost of reproduction of the appellant's plant less depreciation, and used this as one of the elements on which it based its ultimate finding as to value. It did not use it as the sole or exclusive element, and was not authorized so to do. This finding fixed

the cost of reproduction less depreciation at $2,442,834, (Record Ex. p. 253) but was based upon the unit prices for five years preceding June 30th, 1915, (Record Exs. p. 252) being a period long prior to the date on which the Commission fixed the value of the property.

The Public Utilities Commission in reaching its final conclusion considered this element of value along with other elements properly entering into the value, and thereupon made a distinct and unequivocal finding that on the 31st day of December, 1917, the value of the appellant's property in both the State of Washington and the State of Idaho was $20,500,000. (Record Exs. p. 268)

It then considered the apportionment of the total value between the two states and suggested six different methods of appo,rtionment, the first being an apportionment in accordance with the value of the physical properties located in each state. (Record Exs. p. 268, 269)

It then found that an apportionment made on this basis, viz: the value of the physical properties located in each state, resulted in a value of the appellant's property in the State of Idaho amounting to the sum of $3,587,500. (Record Exs. p. 270)

Under each of the other five methods of apportionment suggested by the Commission, the value of the property in the State of Idaho was larger than this amount.

The element of cost of reconstruction, less depreciation, could not have been used solely by the Utilities Commission or by the State Board of Equalization, or by the trial court as the criterion of actual value.

"We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public, and in order to ascertain that value the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction. the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property."

Smyth v. Ames, 169 U. S. 466, 547, 42 L. ed. 819, 849.

San Diego Land & Town Co. v. National City, 174 U. S. 739, 756, 43 L. ed. 1154, 1161.

"The main object of attack is the valuation of the land. It no longer is open to dispute that under the Constitution what the company is entitled to demand in order that it may have just compensation is a fair return upon the reasonable value of the property at the time it is being used for the public. (Citing San Diego Land & Town Co. v. National City, supra). That is decided and is decided as against the contention that you are to take the actual cost of the plant, annual depreciation, etc., and to allow a fair profit on that footing over and above expenses."

San Diego Land & Town Co. v. Jaspar, 189 U. S. 439, 47 L. ed. 892, 894.

Appellant cites the case of Knoxville v. Knoxville Water Company, 212 U. S. 1, 53 L. ed. 371 in support of its contention that depreciation must be allowed.

What this case actually decides is that where cost of reproduction new is used as the sole basis of arriving at the value of the property it should be diminished by the depreciation which has come from age and use. The court said:

> "The cost of reproduction is one way of ascertaining the present value of a plant like that of a water company, but that test would lead to obviously incorrect results if the cost of reproduction is not diminished by the depreciation which has come from age and use."

Knoxville v. Knoxville Water Co. supra

ASSESSMENT OF PLAINTIFF'S PROPERTY BY STATE BOARD OF EQUALIZATION.

That part of the decision of the trial court dealing with the manner in which the State Board of Equalization made the assessment of plaintiff's property, and the basis on which such assessment was made reads as follows:

> "It is thought that the Board of Equalization so found the value to be ($3,620,500) but made an assessment for only $2,750,000. Accordingly it is held that the assessment complained of was and by the State Board of Equalization was intended to be upon a basis of seventy-five per cent of the actual cash value." (Record p. 80, 81)

This finding is not a mere inference or conjecture as suggested by counsel for appellant. It is a necessary deduction from the evidence.

The State Board of Equalization had before it a clear and unequivocal finding of the Public Utilities Commission of the State of Idaho that the actual value of the appellant's property in Idaho was $3,587,500, not including the St. Maries Lighting system. That was the only concrete evidence before it as to the value of the property. It is necessary assumption that the Board accepted this valuation as the actual cash value and proceeded to make its assessment on that premise.

The decision of the Commission disclosed that its findings

were arrived at only after a thorough and painstaking investigation of all the different elements which usually enter into the value of this class of property.

The plaintiff alleged in its Bill that the suit in which said decision was rendered was brought for the purpose of having fixed and determined the value of the plaintiff's property in the State of Idaho, and that said judgment and decision was rendered only after an appraisement thereof by the officers and engineers of the Public Utilities Commission of the State of Idaho. (Record p. 15)

Plaintiff also alleged that between the date on which said valuation was fixed by the Commission and the date of assessment there was no change in the value of said property. (Record p. 15)

Naturally a finding on such a complex question by a Board vested with power to investigate and determine the same, after the proceedings disclosed by the decision, would have a determining influence with the Board of Equalization which had no such opportunity to make an investigation of its own.

There was no other evidence before the Board of Equalization from which it could form any opinion as to the value of the appellant's property. Such evidence as was presented consisted only of formal reports which were entirely without probative value.

It is asserted in the appellant's brief that the Court did not take depreciation into consideration. The Court accepted the findings of the Public Utilities Commission, and the Public Utilities Commission did take depreciation into consideration.

It devoted a considerable portion of its decision to a consideration of the cost of reproduction new and depreciation.

The value of the property of a public service corporation as fixed for rate-making purposes may not necessarily be identical with its value for taxation purposes, but in the absence of evidence to the contrary it should be presumed that its value for one purpose is the same as its value for the other. It would only be where extraordinary conditions existed that a public service corporation should be permitted to earn on a high valuation and pay taxes on a low valuation.

As heretofore pointed out the statutes of Idaho make the findings of the Public Utilities Commission prima facia evidence of the facts therein stated, and the Supreme Court of said State has held that such findings when introduced before the State Board of Equalization on the question of value, are "prima facia, just, reasonable and correct," and may be so regarded by the State Board of Equalization.

Northwest Light & Water Co. v. Alexander, supra.

The State Board of Equalization having accepted the finding of the Public Utilities Commission that the value of the appellant's property was $3,587,500, and added thereto $33,000 as the value of the St. Maries Lighting system, making a total actual value of $3,620,500, proceeded to fix an assessed valuation on the property, and made an assessment of $2,750,000. The assessed valuation was seventy-five per cent of the actual cash valuation, and it is therefore a necessary deduction that the Board of Equalization assessed the plaintiff's property on the basis of seventy-five per cent of its actual cash value.

ASSESSMENT OF OTHER UTILITIES BY STATE BOARD OF EQUALIZATION.

The trial court having found that the State Board of Equalization assessed appellant's property at seventy-five per cent of its actual cash value, then made this finding:

> "The evidence is not sufficient to warrant a finding that the State Board valued any of the utilities at fifty per cent, and the presumption will be indulged that its assessments were as to each other upon a basis of equality, and therefore that it put railroads, telegraph and telephone lines upon the same footing with plaintiff's property." (Record p. 89)

The attack on this finding suggests two inquiries:

First, was the evidence sufficient to warrant a finding that the State Board valued any of the utilities at fifty per cent of their actual cash value, and second, was the trial court justified in indulging in the presumption that the assessment of the property of other utilities assessed by the State Board was made upon the same basis as the assessment of plaintiff's property?

Appellant has quoted quite fully in its brief from the evidence of C. E. Arney, a witness produced by it for the purpose of giving oral testimony as to proceedings before the State Board of Equalization.

Defendants objected to the testimony and on the completion of the direct evidence of the witness, moved that the whole of his testimony be stricken from the record.

This testimony was incompetent and should not have been admitted.

"The record of the Board of Assessment and Equalization is the best evidence at least of its decisions and acts. If the plaintiffs or other express companies wish a definite and certain ruling by this Board upon the deductions which they now seek to make from the record, they could have asked for it and could have asked to have the action of the Board or its refusal to act noted in the record. They could then have offered evidence of just what was done after such request had been made and refused."

Wells Fargo & Co. v. Johnson, 205 Fed. Rep. 60, 80.....

"Again this Board (State Board of Equalization) necessarily kept and evidently was expected by the statutes to keep a record. That was the best evidence at least of its decisions and acts. It the roads had wished an express ruling by the Board upon the deductions which they demanded, they could have asked for it and could have asked to have the action of the Board or its refusal to act noted in the record. It would be time enough to offer other evidence when such a request had been made and refused."

Chicago, B. & Q. R. Co. v. Babcock, 204 U. S. 585, 51 L. ed. 636.

Even if this testimony had been admissable and was considered by the court in reaching his decision, it was so unreliable that it was not worthy of serious consideration. The witness stated that he attended this meeting of the Board of Equalization as a representative of the Northern Pacific Railway Company by whom he was employed, as that company expected to contest its taxes, and that he took down and made notes of those things which he thought he might afterwards be able to use in contesting the assessment, and that he made notes of nothing else. (Record p. 145) Only a portion of his notes were taken down verbatim at the time the statements were claimed to have been made. (Record p. 145)

His testimony related wholly to remarks and statements made by individual members of the Board and did not purport to cover such remarks and statements only when they were such as he thought he might afterwards use in contesting the taxes of his company.

The trial court might very properly have ignored this testimony and given it no consideration at all. It is not necessary, however, to indulge in such an assumption. Even if the testimony was given full credence it was not sufficient to warrant the conclusion that the property of other utilities was assessed at fifty per cent of its actual cash value.

The quotations contained in the preceding statement show that the whole tenor of the conversation was toward an increase in the assessment of the property of railroads and other public utilities.

The statement in appellant's brief that it was repeatedly stated by the Governor without contradiction at the meeting of the Board that it was the intention to assess railroads and power companies at fifty per cent, is not supported by the record.

It was not repeatedly stated by anybody or stated at all by any member of the Board that it was the intention to assess railroads or power companies at fifty per cent of their actual value.

The only statement attributed to the Governor in that connection is, "That is what we assess railroads fifty per cent" and this statement was made in connection with his contention that the railroads were assessed too low. (Record p. 148)

Again counsel makes the following statement in appellant's brief, "The only evidence in the record was that showing the intent of the Board as expressed by its members in open meeting to assess railroads and utilities at fifty per cent."

This statement also is unwarranted as there is no evidence in the record showing such intention of the Board either by expression of its members in open meeting or otherwise.

The presumption indulged in by the trial court that the property of other public utilities was assessed on the same basis as the appellant's property was not an inference upon an inference as suggested by appellant.

As heretofore pointed out, the finding that the appellant's property was assessed on a basis of seventy-five per cent of its actual value was not an inference, but was a necessary deduction from the admitted facts in the case.

After making this deduction and basing a finding thereon, the trial court was then confronted with the question as to whether or not the evidence was sufficient to warrant a finding that the State Board valued other utilities at fifty per cent. There was no evidence in the record to warrant such a finding.

The natural and logical presumption then arose that if the State Board had assessed the property of one public utility at seventy-five per cent of its actual value, that it also assessed the property of other public utilities on the same basis. In other words that it followed the rule of equality and uniformity as to all property assessed by it within its sphere of duty.

In Illinois Central R. Co. v. Greene, 244 U. S. 555, 61 L.

ed. 1309, the taxpayer made a similar contention before the Supreme Court of the United States, but the court held that the contention was clearly unfounded.

> "Upon the final hearing the court reached the conclusion that the valuation of $27,124,240 was itself the result of an equalization by the Board at 80 per cent of what they had found to be the fair cash value of the capital stock in Kentucky; that is to say that they had found the fair cash value to be $33,905,300. Having concluded that equalization should be made upon the basis of 60 per cent the court applied this percentage to the $33,905,300 making the equalized capital stock value $20,343,180, deducting from which the assessed value of the tangibles, $12,377,383 left $7,965,797 as the value of the franchises. *Plaintiff contends that there was no sufficient evidence to support the conclusion that the Board's valuation of* $27,124,240 *was the result of an* 80 *per cent equalization; but the contention is clearly unfounded.*"

Illinois Central R. Co. v. Green, supra

In Greene v. Louisville & I. R. Co., 244 U. S. 499, 61 L. ed. 1280, the plaintiff's property was admittedly assessed at seventy-five per cent of its fair cash value, and other property in the state was assessed at fifty-two per cent of its value, the court said:

> "It is fair to assume that plaintiff's franchises were assessed on the same basis of valuation applied by the Board to other property generally that came within the range of their official duty."

IMPOSITION OF PENALTIES AND INTEREST.

In the decision of the trial court the reduction to which the appellant was entitled was first ascertained, and the court then said:

> "It has tendered and paid $23,080.84, hence there is still due the defendant county $10,049.32, with penalties and interest thereon. Upon the payment of thi samount the residue will be cancelled and the injunctive relief prayed for granted." (Record p. 90)

As the plaintiff had not paid the full amount which the court found to be due, it followed as a matter of course that the statutory penalties and interest would accrue as against the unpaid sum.

By the provisions of one section of the tax laws of Idaho a penalty of six per cent is provided where taxes are permitted to become delinquent. By another section provision is made for the issuance of delinquency certificates and these certificates draw interest at the rate of twelve per cent.

As the appellant did not tender an amount sufficient to pay the taxes which were justly due and had the use of this sum of money during the entire course of the litigation, and the state and county were deprived of its use, it would seem that the statutory penalty and interest was properly imposed.

The appellant evidently places great reliance upon the Washington case quoted at length in its brief. This case appears on its face to support appellant's contention, but a careful analysis of the cases cited in the opinion discloses that the opinion in the Washington case was based upon a misconstruction of the principal case cited in support thereof. In the opinion in the Washington case the following statement appears:

> "Cottle v. Union Pacific R. Co. 201 Fed 39, 119 C. C. A. 371, is one of the best considered cases that has been called to our attention, and from the many authorities

cited therein we gather the following as established principles."

In the Cottle case a part of the levy was illegal and the court held that in view of the illegality of the tax that the unpaid portion should draw interest rather than an enormous penalty, saying in that connection:

> "The statutes of Wyoming provide for a penalty of 18 per cent, but in view of the illegality of the tax, the efforts of the company to pay what was justly due and the controversy which has existed as to their amount, we think they should draw interest rather than this enormous penalty."

Cottle v. Union Pac. R. Co. supra

The facts in the case of United States Trust Company v. New Mexico cited by appellant were entirely dissimilar to the facts in this case. The assessment was made upon 60.7 miles of road while the court found that there were only 55.5 miles subject to taxation. In the opinion the Supreme Court said:

> "The finding of the court shows that no such length of railroad was subject to taxation, but only 55.5 miles, and those were specified and described. The owners of the road were therefore justified in contesting their liability to such assessment and taxation in gross and until there was an identification of the property subject to taxation and a determination of the amount of taxes due it would be inequitable to charge penalties for non-payment.

The reasoning of the Supreme Court of New Hampshire in the case of Western Union Telegraph Co. v. State, 64 N. H. 265, 9 Atlantic 547 is more logical than the position taken by the Washington court. In that case the court said:

> "All other taxpayers either paid their taxes on or before the first of December of these years or became liable to

> pay interest thereafter till they did pay them, and justice requires that the plaintiff should pay interest on their just and equal portion of the public burden due the state on or before the first of December of each of these years. Had the plaintiffs tendered or offered to pay when due the sum afterwards found to be their proportional share and the state had declined or neglected to take the same a different case would be presented. Haywood v. Hartshorn, 55 N. H. 476, 483; Thompson v. R. R. 58 N. H. 524. A taxpayer appealing from his excessive assessment may be unable to determine the exact amount which will be found by the appellate court to be his share of the public expense. He may be unable to protect himself against the interest that will accrue after the first of December by paying the exact amount of his tax debt before it is ascertained, but this is not a reason for giving him an exemption that is not enjoyed by his neighbors who do not appeal.''

The foregoing case was approved and followed in the later New Hampshire case of Winnipiseogee, etc. Co. v. Gilford, 15 Atlantic 137.

A taxpayer would secure an unjust advantage of other taxpayers if he could relieve himself of the payment of penalties and interest by merely tendering to the collecting officer the amount which he conceded to be due. In this case the appellant has had the use of $10,049.32 for nearly two years and the public revenues have been deprived of the use thereof, and it may be fairly assumed have suffered considerable inconvenience by reason of such deprivation. The Boards charged by law with the duty of fixing the tax levies make such levies according to the amount of money to be raised for conducting the affairs of the municipality based upon the total assessed valuation of its property. There can be no doubt that Koo-

tenai County and the smaller taxing districts entitled to a portion of these taxes have been seriously discommoded by the failure of the plaintiff to pay its taxes at the time they were due under the law.

If the plaintiff desired to tender only a part of its taxes it did so at its peril. If the court afterwards found that the tender covered all taxes due the plaintiff would be relieved from the payment of any penalty or interest, but if the tender was found to be insufficient penalty and interest should be imposed upon the balance found to be due.

The plaintiff was not bound to seek a remedy by enjoining the collection of the tax. It could have paid its taxes under protest and afterwards maintained an action at law for the recovery of such portion as was unjustly charged against it.

State v. Carson City Savings Bank, 30 Pac. (Nev.) 703, 709.

A QUESTION FIRST RAISED ON APPEAL WILL NOT BE CONSIDERED.

Appellant has raised the question as to the imposition of penalty and interest for the first time on this appeal, and under the well established rule that a question not raised in the trial court will not be noticed on appeal, this question should not be considered.

2 Corpus Juris, Appeal and Error, 689, *and numerous cases cited in support of the text.*

> "The general rule is that an appellate court will consider only such questions as were raised in the lower court. This rule is so well settled as to be almost unquestionable, and the only practical difficulty which may arise

in a particular case is with reference to its application, for there are some limitations on and exceptions to the rule which will presently be discussed. An all sufficient reason for the existance of this rule is that if the question had been raised in the lower court the objection might have been remedied, for otherwise if an objection not raised below could be raised in the appellate court, there would be no assurance of any end to the litigation as new objections could continuously be raised on successive appeals."

2 *R. C. L.* 69-72;

Huse v. U. S. 222 U. S. 496, 56 L. ed. 285;

White v. Manter, 84 Atlantic (Maine) 890, 42 L. R. A. new series, 332.

"Where a case is tried before the court without a jury a party desiring to present a question of law to the appellate court as having been passed upon by the court below, must submit the proposition of law to the trial court, and accept to the ruling of the court thereon."

2 *R. C. L.* 76,

Niagram Fire Insurance Co. v. Bishop, 154 Ill. 9, 39 N. E. 1102.

It was never suggested to the trial court at any stage of the proceedings either before or after judgment that it was improper or illegal to impose the statutory penalty and interest on the amount found to be due for taxes which had not been paid.

It may be contended that the question was raised by the allegations in the Bill of Complaint, to the effect that the defendants had wrongfully attempted to attach and charge certain penalties against the plaintiff, but this allegation did not raise or suggest the question which appellant is now relying on. The allegations in the Bill of Complaint amounted merely to this—

that the plaintiff had tendered the full amount which was due and therefore that penalties and interest on the amount unlawfully claimed could not be collected. There could be no question about the correctness of that contention. If the court had not found any additional amount due from the plaintiff, no penalty or interest would have attached, but when an additional amount was found to be due, penalties and interest were added as a matter of course.

The appellant did not object to including the penalties and interest on the amount found to be due. The decision in the case was filed on February 28th, 1920, and the decree was not entered until three months later, to-wit, May 28th, 1920. If the appellant objected or desired to raise any question regarding penalties and interest on the amount found by the court to be due, it had every opportunity to act, and it was its duty in some appropriate manner to direct the attention of the trial judge to its claim that penalties and interest could not lawfully be charged against it. This could have been done by motion or suggestion at the time the formal decree was entered. Appellant, however, sat by and permitted the decree to be entered adjudging penalties and interest without objection or in any manner directing the attention of the court to its present claim that penalty and interest is unlawful.

It would be extremely unfair to the court and adverse parties to permit this question to be raised the first time on the appeal.

CONCLUSION

In granting to the appellant the relief to which the evidence

showed it to be entitled, the trial court acted in accordance with the principles of equity. As to a portion of the property in the state the plaintiff was over-assessed, but as to other property of the same class assessed by the State Board of Equalization it had no complaint. Therefore, it would have been unfair and inequitable to have reduced its assessed valuation to fifty pe cent of the actual value of its property. The method adopted by the court gave to the appellant all the relief to which it was entitled.

The decree should be affirmed.

Respectfully submitted,

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